

PIERRE EWING,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	Docket No. IBIA 96-46-A
	:	
ACTING BILLINGS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	July 25, 1996

Appellant Pierre Ewing seeks review of a January 18, 1996, decision issued by the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning stumpage payments received for timber harvested after the 1994 Baby Dean Fire on Northern Cheyenne Allotment No. 636-A. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decision.

Appellant's wife, Mary Ewing, died on December 16, 1990. Her trust or restricted estate was probated by Administrative Law Judge Keith L. Burrowes. By order dated February 26, 1992, Judge Burrowes approved Mary's Last Will and Testament, under which she left a life estate in all of her trust property to appellant. The remainder interest in Allotment No. 636 was left to Lenwood P. Ewing, the son of Mary and appellant. Pursuant to 43 CFR 4.251, 1/ Judge Burrowes approved several claims against Mary's

1/ Section 4.251 provides in pertinent part:

"After allowance of the claims of administration, claims shall be allowed:

"(a) Priority in payment shall be allowed in the following order * * *:

"(1) Claims for expenses of last illness not in excess of \$500, and for funeral expenses not in excess of \$500;

* * * * *

"(3) Claims of unsecured indebtedness to a Tribe or to any of its subsidiary organizations;

* * * * *

"(c) No claims of general creditors shall be allowed if the value of the estate is \$2,500 or less and the decedent is survived by a spouse or by one or more minor children. In no event shall claims be allowed in an aggregate amount which is in excess of the valuation of the estate; the general creditors' claims may be prorated or disallowed entirely, and the preferred claims may be prorated subject to the limitations contained in paragraph (d) of this section.

"(d) If the income of the estate is not sufficient to permit the payment of allowed claims of general creditors within 3 years from the date of

estate, including two priority claims of \$4,655.03 plus interest, owed on a Northern Cheyenne Short Term loan, and \$500 owed to the Rausch Funeral Home; and a general claim of \$1,095 plus interest owed to the funeral home.

Sometime in 1994, the Baby Dean Fire occurred on the Northern Cheyenne Reservation. Timber on Allotment No. 636 which was burned in the fire, was subsequently harvested. BIA admits that, through an error, income from the harvest was paid to Lenwood, rather than being credited to Mary's estate's Individual Indian Money (IIM) account. Lenwood voluntarily returned the check to BIA. When the income was credited to Mary's estate's IIM account, appellant was notified that \$3,774.88 was being applied toward the tribal loan.

In his notice of appeal to the Area Director, appellant argued that BIA should have exercised discretion to decline to honor the hold on Mary's IIM account because appellant was elderly and living on a fixed income, and that BIA was discriminating against him for political reasons because Lenwood, a member of the tribal council, had received a check, while appellant received nothing because of the hold on the estate account.

The Area Director's January 18, 1996, decision states at pages 2-3:

The Administrative Law Judge's order allowed the Northern Cheyenne Short Term Loan claim of \$4,655.03 plus interest. Priority and general claim allowed must be paid from funds held or funds which will later accrue to the credit of the estate account. It is our position the superintendent does not maintain the authority to override approved claims and cannot disburse otherwise for personal hardships.

It is also our position that when the probate claims are released and Mary Ewing's estate is closed, you would be entitled to any and all other timber stumpage salvage funds harvested from burn areas.

The timber salvage checks previously issued to Lenwood were erroneous. The distribution of funds was the result of the forestry timber sales program['s failure] to verify status of ownership and the disposition of the claims against [Mary's] estate.

Appellant's notice of appeal states at page 1:

I wish to add additional information for my Statement of Reasons for this appeal, including information relating to the

fn. 1 (continued)

allowance; or to permit payment of the allowed claims of preferred creditors * * * within 7 years from the date of allowance, then the unpaid balance of such claim shall not be enforceable against the estate or any of its assets."

admitted administrative error(s) resulting in the wrongful disbursement of other timber funds which should have been deposited in my deceased wife's [IIM] account. Please send me instructions regarding appeal procedures, as well as copies of applicable appeal procedures appearing in 43 CFR as referenced by the Area Director in his decision. I cannot afford an attorney nor can I afford to appear personally before the Board. I request time to submit any additional documents as necessary in support of my appeal.

I also request that the Board immediately issue a Stay or other order as may be appropriate to the Superintendent, * * * directing him to leave the disputed funds in Mary Ewing's IIM account until the Board has acted on my appeal and issued a decision. I am a senior citizen, living on a fixed income, and need funds from any and all sources for my subsistence expenses. I also request that any applicable fees and costs be waived for me in this appeal and that I be allowed to proceed in forma pauperis. I also request the assistance of [BIA] in providing me documents and other assistance in this appeal.

In its January 30, 1996, predocketing notice, the Board responded to appellant's requests. It provided a copy of the procedural regulations; and advised appellant that nothing was due from him until after notification from the Board that it had received the administrative record, that the Area Director's decision was already stayed under 43 CFR 4.314, and that there were no costs for filing an administrative appeal. It further informed appellant that he should direct his request for assistance from BIA to the Area Director.

The Board docketed this appeal on February 22, 1996, after receiving the administrative record. The notice of docketing informed appellant that he was not required to file a brief, but that he bore the burden of showing the error in the Area Director's decision.

Appellant did not file an opening brief or other statement.

The Board has consistently held that an appellant bears the burden of proving that the decision appealed from was erroneous or not supported by substantial evidence. See, e.g., Estate of Richard G. Kihega, Sr., 28 IBIA 195 (1995), and cases cited therein. The only statement appellant made in his notice of appeal that can be construed as an argument as to why the Area Director's decision was erroneous is the reference to "admitted administrative error(s)." It is clear that BIA erred in issuing a check to Lenwood. Probably, as the Area Director suggested, this error arose from the failure to verify ownership and the status of claims. However, this error was corrected by Lenwood's voluntary action in returning the check. Once the income was properly credited to Mary's estate's IIM account, it was subject to the hold in favor of the tribal loan program.

The Board concludes that appellant's filings with the Board did not carry his burden of showing error in the Area Director's decision.

The Area Director provided the Board with a copy of a May 5, 1996, letter he wrote to appellant in response to appellant's request for information in connection with this appeal. This letter suggests that appellant may actually be questioning the allowance of the claim submitted by the tribal loan program in Mary's estate. Even if appellant had made this argument to the Board--which he did not--appellant would not have prevailed.

In order to ensure that appellant was aware of the probate proceeding and of his rights in regard to it, the Board asked Judge Burrowes to review the probate record in Mary's estate. Judge Burrowes reviewed the record, including the untranscribed tape of the hearing. In a May 7, 1996, letter to the Board, Judge Burrowes stated that Lenwood was the primary witness, but that appellant was present during much of the hearing, including that portion of the hearing devoted to consideration of the claims against the estate. Judge Burrowes stated, inter alia:

3. Two claims were discussed and approved, although Lenwood thought the amount from Tribal Credit was his and that his mother's was a different amount. I stated at the hearing that we would call the [tribal] credit committee and make sure of the amount. The file shows that such a call was made and the amount submitted was the proper claim for Mary.

4. [Appellant] did not object to the Tribal claim, nor to the one from the funeral home.

5. The notice of the Order Approving Will and Decree of Distribution contained the notice to all parties that such Order would become final if a Petition for Rehearing was not filed within 60 days of the date of mailing. [Appellant] was sent a copy of such order and notice at the same mailing address that was used to send him notice of the original hearing.

6. No petition for rehearing was ever received from [appellant], or any of the children.

By order dated May 15, 1996, the Board sent a copy of Judge Burrowes' statement to the parties in this proceeding. The parties were given until June 21, 1996, in which to comment on any of the information contained in the Judge's statement. No comments have been received.

Appellant was, or should have been, on notice as a result of the probate of Mary's estate that a hold would be placed against the estate IIM account to pay the tribal loan. Although appellant was present at the hearing, he did not object to the claim. Judge Burrowes informed the parties of the right to seek rehearing, but appellant did not exercise this right. Appellant cannot collaterally attack the claim approved in the probate of Mary's estate by objecting to the payment of that claim from the estate IIM account.

Appellant may attempt to convince the tribal loan officers to reduce or even eliminate the claim against Mary's estate. Any such decision by

the tribe would need to be presented to and approved by the Administrative Law Judge. However, without such action, BIA is not free to disregard a claim approved in a probate proceeding.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Billings Area Director's January 18, 1996, decision is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge